No. 3624.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Louisa Pickens et al.,
Appellants,

vs.

J. H. Merriam et al.,
Appellees.

Reply of Appellants to the Answer of Respondents to the Petition of Appellants for Rehearing and Reconsideration.

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Reply of Appellants to the Answer of Respondents to the Petition of Appellants for Rehearing and Reconsideration.

The respondents have answered our petition for rehearing and reconsideration and they assert:

1. That the question of the ownership of the appellants of the property of the estate of Jeanette was not the main issue in the case, from which assertion and from the strenuous contention of respondents in their brief, they are compelled to admit that it *was an issue in the case.* We say that it was the main issue in the case but whether it was or was not the main issue yet it

was a *vital issue and necessary to be decided.* It was positively the main issue, too, because the ownership of the whole of the estate is of greater majesty and importance than the seeking of an imposition or impressment upon that estate of a constructive trust, and for only a part of said estate. Surely the absolute ownership of the whole of an estate is greater and of more importance as an issue in the case than any part or than any impressment of a trust upon only a part of it.

2. The respondents' next position is that the absolute silence of the court upon that issue of ownership must be considered as a decision of the court that appellants were not the owners. To this we reply that silence does not constitute a decision of the court and that there being no express decision of the court upon that question of ownership there certainly cannot be any implication of a decision arise by a complete abstaining from deciding it.

3. The respondents further answer that the court should decide this question of ownership and that it should decide it in favor of the respondents. This position is not easily reconcilable with those of the former two positions that they have taken, surely. They have nothing new to say upon the matter, but simply refer in this and in their other positions to what they have said in their brief, so it is but reiteration or referable to that, save, however, that they cite the case of Estate of Simonton, 59 Cal. Dec. p. 558, S. C.

190 Pac. Rep. 442. That case was cited by them to endeavor to impress upon the court that the absolute ownership of the appellants to these valuable properties of which they became the owners by descent from Jeanette was divested from the appellants by what they claim was a decree of distribution of the estate of Jeanette. To this position appellants reply that the case mentioned and cited as above is most excellent law from beginning to end, a very careful written decision by Judge Olney. That was a case wherein the Probate Court had before it for decision, upon the controversy, the very property over which the contention was had, and the question of heirship or ownership depended upon the solution of whether or not the property was community property of the pre-deceased spouse, and that court determined that it was not the community property, and awarded it to those to whom it should have gone by operation of law under the statute of descent. The decision, written by Judge Olney, distinctly stated that such a decree could not be held as having adjudicated upon any property of the estate which had been omitted by fraud or by mistake, and it further said that, in order that the blood relatives of the predeceased spouse could inherit, there was necessary to be shown not only such blood relationship of that predeceased spouse but also *plus* the further fact that it was the community or separate property of the predeceased spouse at his death, and that it had come by descent from such spouse to the deceased widow or widower as the case might be.

We therefore see that, in accordance with the above decision and also in accordance with the decision of this very court of appeals in this very case reported in the 242nd Federal Reporter, page 363, these properties which were concealed and excluded from all administrative proceedings (whether by fraud, accident or mistake excluded) form no part of any property that was possible to have been adjudicated upon in the probate proceeding of any kind. Moreover, this whole case teems with incontrovertible obstacles to any other view. That is, it was not before the court for either actual or constructive adjudication. Still further, the instruments signed by Jeanette as to the lands, and the subsequent records of them after her death, presented an apparently valid title in the respective purported grantees, and notwithstanding that the administrator of her estate and the other defendants knew of the circumstances which rendered these deeds absolutely worthless because of non-delivery, yet this court knows that the appellants had no knowledge of that fact and that they had a right to rest upon the belief that they were absolutely valid deeds, from their mere appearance, and this court knows that the appellants obtained no knowledge or information of their absolute worthlessness or their grounds for considering them such until 1914 or shortly before the commencement of this suit, and consequently they could not be chargeable with constructive necessity of appearing at Probate Court on something in the shape of property that was never treated as any part of the

estate and as to which they had no knowledge at the time that it formed part of said estate, being concealed in the manner indicated. Furthermore, the Probate Court could not possibly have passed upon the question of ownership by heirship as to any of these lands and properties so concealed unless it had investigated the facts and had determined thereon and had adjudicated as to whether or not those particular properties were the properties or the fruits or proceeds of the properties that belonged to Ferdinand at his death, as his separate estate, and had passed by descent to Jeanette, for without the proof of adjudication of that *plus* element so stated by Judge Olney, in the above case cited, there could have been no adjudication with respect to the particular property.

In the case at bar, the appellants have proven that all the property that belonged to Jeanette at the time of her death was the very separate property or the fruits or proceeds of the very separate property which constituted the estate of Ferdinand, her pre-deceased husband, at the time of his death, and that it passed by descent to her from him, and it has been conclusively proven and is admitted by respondents that the appellants are the blood relatives of Ferdinand, as stated in the complaint.

Furthermore, as already argued, the Probate Court had no jurisdiction even to make a decree of distribution of the small amount of personal property on which it passed.

This court has, in its decision, already stated in its recital of facts, that these questions are *issues in the* case and has referred to portions of the record which substantiate such statement.

Whether or not this reply to the answer of respondents is rulable, it certainly is as much so as is the answer of the respondents and we will assume that counsel for the respective parties are not amenable to reprimand for this prolonging of discussion.

Respectfully submitted,
FRANCIS G. BURKE,
Counsel for Appellants.